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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. Cox, Deceased, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. Cox, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, Southern Railway Company, prays this Court to review on writ of certiorari a judgment of the Court of Appeals of the State of Georgia in the case of *Mrs. Olivia Cox Lunsford, as Administratrix of the Estate of J. M. Cox, deceased,* v. *Southern Railway Company,* rendered on the 22nd day of February, 1935, (R. 164) and based upon a written opinion by that court rendered on the same date (R. 155-164), but which judgment only became

final on the 29th day of May, 1935, (R. 166) when, after motion for rehearing filed by petitioner was denied by the said Court of Appeals on the 2nd day of March, 1935, petitioner's application for certiorari to review said judgment was denied by the Supreme Court of Georgia on said 29th day of May, 1935 (R. 166).

The Court of Appeals of Georgia was, therefore, the highest court of the state in which a review and decision could be had by your petitioner and its judgment became final on the 29th day of May, 1935. The record in the Court of Appeals of Georgia, the denial by that court of petition for rehearing (R. 164), and the denial by the Supreme Court of Georgia of petitioner's application to that court for writ of certiorari (R. 166), have been printed in this Court and page references herein are to the record as printed for this Court.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This was an action brought by the plaintiff administratrix, respondent here, for damages for the alleged wrongful death of her intestate. It was brought, tried and decided under the Employers' Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59, and under the Boiler Inspection Act amendments to the Safety Appliance Act, 36 Stat. 913, 43 Stat. 659, 45 U. S. C. 22-34. It was alleged in the complaint and admitted in the answer (R. 7, 12 and 16, 19) and it appears from the evidence without dispute (R. 45, 74, 87, 89) that at the time of the fatal injury the intestate was employed and petitioner was engaged in interstate transportation. He was locomotive engineer driving petitioner's interstate passenger train No. 40 from Birmingham, Alabama, to Atlanta, Georgia.

The judgment of the Court of Appeals of Georgia, here sought to be reviewed, affirmed a judgment for respondent

on a verdict for $5,000 as damages for the alleged wrongful death of her intestate, the engineer of said train. He was killed by the overturning of his locomotive, resulting from the derailment of the front trucks caused by the act of a nine year old negro boy in putting a rock on the rail in the path of the train "to see the train mash it." (R. 91, 92.)

The evidence shows conclusively that the *causa causans* of the tragedy was the mischievous act of the negro child, over whom petitioner had no control and for which petitioner is not responsible. When he saw the train approaching he placed the rock on the track at the point marked "First derailment" on Plaintiff's Exhibit A (R. 99). The crushed rock was found on each side of the rail and beginning a few feet beyond that point there were found the indentations of the wheel flange of the front trucks, which had mounted the rail at the point where the rock was crushed, derailed and had run on the cross ties from that point a distance of about seven-tenths of a mile, until the locomotive reached the east passing track near Bremen, Georgia. At the point marked "Final derailment" (R. 99) the striking of the derailed front truck wheels against the rails of the passing track derailed the entire locomotive and overturned it, causing the death of plaintiff's intestate, the engineer.

The gist of the matter here involved is that, under these circumstances, involving no moral or legal responsibility of petitioner for the death of the engineer, liability was imposed upon petitioner by the judgment sought to be reviewed on the theory that the failure of a device known as "Wright's Little Watchman" to operate so as to apply air brakes in emergency between the first derailment of the front truck wheels and the final derailment of the locomotive, and thus the failure of this device *to intervene to prevent* the final derailment was a violation of an absolute duty under the Boiler Inspection Act making petitioner liable even without fault or negligence. And this liability,

imposed not because the device in any way contributed to or caused the accident, but merely because it failed to intervene to prevent the final derailment, was imposed under the Boiler Inspection Act, although the device was not a part of a locomotive required by that Act or by any rule or test of the Interstate Commerce Commission under that Act, but was an experimental device, not in general use on railroads, but being used experimentally by this petitioner as an added safety device beyond all requirements of law, a device not positive or certain in its action, which would sometimes act in case of a front truck derailment to put air brakes on in emergency and stop the train but as often would fail so to act and furnish this extra-legal safety feature. It was a device which could not possibly endanger the safety of operation of the train. It might or might not, depending on many elements of track curvature, height of rail, grade, adjustment, and unpredictable mechanical functioning, so act as to contribute an extra element of safety over and above all those elements required by law. It was used in the hope that it might furnish this added element of safety but with full knowledge that it could not be relied on to do so with any degree of certainty, that it sometimes would and it sometimes would not.

"Wright's Little Watchman" is a mechanical device the frame of which is attached to the frame of the locomotive. It is illustrated in detail in No. 8, Exhibit "S" (R. 117), in No. 9 (R. 118), and the rough drawing, Exhibit "U" (R. 120). Its position on the locomotive and form are illustrated by the photographs Exhibits "K" (R. 109), "L" (R. 110), "M" (R. 111), "N" (R. 112). Briefly described, the main part of the "Watchman," attached to the frame of the locomotive, consists of a body and a long projecting trigger, mechanically connected with a valve, in turn connected with the air line of the train. The trigger projects into the opening of a rectangular trip bracket attached to the front truck frame. The theory and purpose of the device is that if the front truck becomes derailed, the truck and its wheels drop lower, or strike the cross ties and

bounce higher than normal, or sway out of line sidewise, causing one side of the trip bracket to strike the trigger of the "Watchman," which in turn actuates the valve, and thereby the train air line, setting the brakes in emergency. (R. 74-85.)

Obviously the adjustment of such a device is not an exact science. One adjustment will not suit all conditions of track, curve and speed. If the bracket is set so as to be too close to the trigger, any slight unevenness of track, such as the outside elevation of a sharp curve, will sway the engine sufficiently to cause the bracket to strike the trigger, actuate the valve and stop the train in normal operation. If the bracket is set too far from the trigger, even a derailment of the front truck will not move the bracket sufficiently to strike the trigger and actuate the valve. If the front trucks derail but do not drop or move sufficiently out of normal position, the bracket will not strike the trigger and the device cannot function. The adjustment is a matter of empirical trial and error and cannot possibly fit all conditions of track and speed but must be aimed to fit the greatest number or the average of the conditions and to come within maximum conditions. Necessarily, therefore, it can never be known with certainty whether in a particular situation the device will operate effectively to set the brakes if the front truck is derailed, as happened in this case. (R. 74-85, 93-97.)

1.

Questions Involved.

The questions involved in this petition are: (a) Is this device, known as "Wright's Little Watchman," attached to a locomotive used in interstate commerce, a part or appurtenance of a locomotive within the meaning of the Boiler Inspection Act, 45 U. S. C. 22-34, where such a device is not required by or mentioned in said Act, or in any Safety Appliance Act, or in any of the rules and regulations promulgated in accordance therewith by the Interstate Commerce Commission, especially where it is shown by the evi-

dence that such a device is not in general use on railroads, is an experimental device used by only one railroad on some of its locomotives, and the use of which could not possibly imperil life or limb, but that it is used in the hope that it will operate and thereby add to the safety of the locomotive and train? (b) Does the Boiler Inspection Act place upon the carrier the duty of knowing that every device used on a locomotive, no matter for what purpose, will operate at all times and under all conditions? (c) Does the failure of such a device to operate on a particular occasion so as to add an additional safety element not required by law and thereby prevent serious consequences of an accident otherwise caused constitute a violation of the Boiler Inspection Act? (d) Does the use of such a device place upon the carrier an absolute duty to maintain it in proper condition at all times and impose absolute liability if it fails to function as hoped on a particular occasion?

2.

How the Federal Questions Under the Boiler Inspection Act Arose on the Pleadings.

In both counts of the respondent's (plaintiff's) petition (complaint) there were averments that the derailment was caused by certain alleged insufficiencies and defects in the track; and in the second count of the petition it was claimed that the front trucks struck a rock on the outer rail on a sharp curve in the track and that the alleged insufficiencies and defects in the track contributed to the derailment, and that petitioner's employees were negligent in permitting the rock to be placed on the track and in failing to observe it and stop the train. (R. 6-15.) Petitioner demurred to the averments as to alleged insufficiencies and deficiencies in the track upon various grounds, which were overruled. (R. 21-30.) There was some slight evidence in respect thereto, though the overwhelming weight of the evidence showed that no such insufficiencies or deficiencies existed,

or, if they did exist, that they in no way proximately caused or contributed to the derailment of the front trucks of the locomotive. In its answer petitioner averred that the front trucks of the locomotive were derailed by a rock on the outer rail on a sharp curve, placed there by some miscreant just a few moments prior to the arrival of the train at that point. (R. 19-20.)

The undisputed evidence of the nine year old negro boy, Charley Lee Lowe (R. 91 *et seq.*) was that when he heard the train coming he placed this rock on the track "to see the train mash it," and that when the front wheels struck the rock "the engine ran, after it hit the rock, before the wheels got off, about as far as from here to the wall." He saw the front truck wheels off the track. (R. 92.)

The undisputed evidence further showed the fragments of the rock at the point of first derailment, the marks on the rail and the indentations of the wheels on the ties from that point to the point where the engine overturned. (R. 57-58, 83; 94.)

There were also averments in amendments to the petition that the safety chains were too short (R. 33-34), but there was no evidence in support thereof. The trial judge briefly charged the jury on this phase of the case. (R. 141-142.)

These matters, however, are in no way involved in the questions now presented by this petition, and will not be further considered for the reason, as petitioner insists, that the entire case in the trial court, and especially in the appellate courts of Georgia, turned upon the use by petitioner on the locomotive of the device known as "Wright's Little Watchman," respondent contending and petitioner denying that it was a part or appurtenance of the locomotive within the meaning of the Boiler Inspection Act, and the judgment of the Court of Appeals imposing liability on petitioner as for violation of an absolute duty under that Act, merely because the device failed to prevent the final derailment.

In both counts of the petition it was alleged that the locomotive was equipped with the device above referred to, and that this device was so designed that if the front trucks of the locomotive derailed the air brakes would apply and the train would be stopped (R. 9-10 and 13-14); that the train ran for seven-tenths of a mile after the front trucks were derailed before the locomotive overturned; that the device had not been properly inspected and was not in proper condition and did not operate at the time, and had it operated the train would have been stopped in a distance of two or three hundred yards and the locomotive would not have overturned. Petitioner demurred to the averments of each count of the petition with reference to this device (R. 25-26 and 29-30), the substance of such demurrers being that such averments were insufficient to be made the basis of a cause of action, that this device was not required by and there were no averments tending to show that it was required by the Boiler Inspection Act or the rules and regulations promulgated in accordance therewith by the Interstate Commerce Commission, that the failure of the device to operate was not shown to be the proximate cause of or proximately contributing to the death of the decedent, and that the averments with reference thereto were insufficient in various respects. These demurrers were overruled and exceptions taken thereto (R. 31-32, 38-39), and these exceptions were urged before the Court of Appeals of Georgia. (R. 2-3.)

In its answer (R. 18 and 20) petitioner admitted that there was in use on the locomotive a device known as "Wright's Little Watchman," but averred that this was a device in a mere experimental stage and uncertain in its operations, that its use was not required under the Safety Appliance Acts of Congress, or any regulations made in pursuance thereof; that it would not operate at all times and under all conditions when the front trucks were derailed, but was used in the hope that it might operate if the front trucks were derailed.

3.

The Evidence as to "Wright's Little Watchman."

There was no evidence supporting or tending to support the averments that this device had not been properly inspected or that it was not in proper condition. Had there been, a very different question as to liability for common law negligence would have arisen under the Employers' Liability Act. Here there was merely proof from which it could be inferred that the device did not function to set the air brakes when the front truck wheels derailed. Upon this, absolute liability, regardless of fault or negligence, was imposed on petitioner, under the Boiler Inspection Act.

Respondent took the deposition of Mr. H. B. Goff, Master Mechanic of the Birmingham Division of petitioner, and offered the same in evidence, in which he described this device and the theory upon which it was based (R. 74 *et seq.*). On cross-examination by petitioner's counsel he testified (R. 86):

> "This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine; in other words, we couldn't make them exactly the same thing; we have set them the same thing and had them to set

> the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road * * * At times it wouldn't set using the same engine."

Mr. M. E. Madden, the General Superintendent of and a witness for petitioner, testified with reference to this device (R. 96) as follows:

> "On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is bought by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. *The use of this device cannot possibly endanger the operation of the train.* It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. *My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty.*" (Italics ours.)

There is nothing in the record contradicting or tending to contradict this testimony of Mr. Goff and Mr. Madden.

Petitioner insists that this testimony clearly shows: (a) That this device was not in general use; (b) that it is in an experimental stage; (c) that it is uncertain and cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive are derailed; (d) that even in theory it would operate only if conditions developed which would bring the bracket in contact with the trigger; (e) that it was used merely in the hope that it might possibly operate if the front trucks became derailed; (f) that its use could not possibly cause "unnecessary peril

to life or limb'' or in any way imperil the safety of the locomotive or train, but on the contrary might possibly add an element of safety not required by law and prevent injury to those on the train; (g) that the use of such a device on locomotives is not required under the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Boiler Inspection Act; and (h) that the use of this device shows an effort on the part of petitioner to go beyond the requirements of law in promoting the safety of its employees and those on its trains. Petitioner therefore insists that it cannot, under the controlling federal law, be penalized merely because on this particular occasion the device was not effective to provide the additional safety element beyond the requirements of law and to prevent the results of an accident otherwise caused.

The inescapable fact is that if this same locomotive had never had the "Little Watchman" applied to it, it would have compiled with all requirements of federal law, and under the same circumstances the same accident would have happened just as it actually did, without any liability on petitioner as for violation of the absolute duties imposed by the Boiler Inspection Act. With the device actually applied, but failing to operate to set brakes in the particular circumstances, the locomotive was identically as safe to operate and as free from "peril to life or limb'' as if the device had never been applied at all.

4.

Charge to Jury.

The trial judge, after charging the general provisions of the Employers' Liability Act (R. 145), then gave in charge the Boiler Inspection Act, 45 U. S. C. 23 (R. 148), and instructed the jury in substance that the same applied to the case and that under this Act (R. 149, 150, 151) an absolute duty devolved upon the petitioner to so maintain the device that it would operate, and that a failure of the device to

operate would authorize a recovery, if this was the proximate cause of the death of the decedent. The court did undertake to limit this by submitting to the jury the question as to whether or not the device was in an experimental stage of development (R. 148-149, 151) but there was no justification for submitting this question of fact to the jury, since all the evidence showed without dispute that the device was experimental and was not a device in general use, and since it is for the Interstate Commerce Commission to approve and require devices under the Boiler Inspection Act, which it can do only after hearing, on sufficient evidence, and upon sufficient findings of fact. *United States* v. *Baltimore & Ohio R. Co.*, decided Jan. 7, 1935, 293 U. S. (Adv.) 454, *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

In petitioner's motion for new trial error was assigned on the portion of the charge dealing with this device and with the Boiler Inspection Act, upon the grounds that the use of the device was not required by the Boiler Inspection Act or the rules and regulations promulgated by the Interstate Commerce Commission, that the Act was inapplicable and in no way pertinent, and other similar grounds. (R. 121 *et seq.*)

5.

Questions Made in Court of Appeals.

It will thus be seen that by exceptions to the overruling of its demurrer, by answer and by assignments of error to the charge of the trial judge, the questions presented in this petition were fully and clearly made in the trial court and in the Court of Appeals of Georgia.

6.

Decision of Court of Appeals.

In the judgment of the Court of Appeals (R. 155, and especially in the 4th, 5th, 6th, 9th, 11th, and 12th divisions of the opinion), now sought to be reviewed, that court held

flatly that the Boiler Inspection Act applied in the case, that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive within the purview of that Act, that an absolute duty devolved upon the defendant railway company so to maintain the device that it would have operated when the front trucks of the locomotive were derailed, and that a failure to operate authorized a recovery by respondent. The effect of that decision is that anything actually used on a locomotive is a part or appurtenance thereof within the meaning of the Act, regardless of the character or purpose thereof or of whether or not it is specified in the Act or in the rules and regulations of the Interstate Commerce Commission promulgated in accordance with the Act.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The undisputed evidence is to the effect that "Wright's Little Watchman" will operate only when conditions develop that will bring the bracket in contact with the trigger, that it cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive become derailed, that actual experience has shown that sometimes it will operate and sometimes it will not; that occasionally it will operate and stop a train when the trucks are not derailed; and generally that it is an uncertain experimental device not in general use on railroads (Goff's cross-examination, R. 86, and Madden's testimony, R. 96).

2. No such device, either by name or description, is required or even mentioned in the Employers' Liability Act, the Safety Appliance Acts, the Boiler Inspection Act, or the rules and regulations of the Interstate Commerce Commission promulgated in pursuance thereof. This Court will doubtless take judicial cognizance of these rules and regu-

lations, but if not, this fact is shown by the undisputed testimony of Mr. Madden (R. 96).

3. The Boiler Inspection Act, 45 U. S. C. 23, provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

That Act applies only where the use of a part or appurtenance would cause unnecessary peril to life or limb unless it was in proper condition and safe to operate; and does not apply to the use of a device which could not possibly endanger the locomotive or anyone on the train, but might possibly add to the safety of the train if the conditions developed which would cause it to operate. It applies only to such parts and appurtenances as are required to be inspected in accordance with the provisions of the Boiler Inspection Act, and to meet the tests prescribed in the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Act; and does not apply to a device not required to be inspected or tested.

4. The Boiler Inspection Act merely requires a condition which will permit use of the locomotive "without unnecessary peril to life or limb." *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

5. Unless specified in the Act, the rules and regulations prescribed by the Interstate Commerce Commission fix the standard. *United States* v. *Baltimore & Ohio R. Co.*, decided Jan. 7, 1935, 293 U. S. (Adv.) 454; *United States* v. *Southern Railway Co.*, 1 F. (2d) 487.

6. If the device had never been applied to this locomotive at all, the locomotive would have fully complied with all requirements of federal law, yet the fatal accident would have occurred just the same. With the device actually applied, but failing to act to set brakes on the particular occasion, the locomotive was in exactly the same condition of safety as if the device had never been placed on it, and as fully complied with all federal safety requirements. The presence of the non-operating device in no way influenced the chain of causation. Yet liability has been imposed upon petitioner merely because it vainly attempted to do more than the law requires as to safety, whereas if it had not made such attempt there would have been no liability under federal law.

7. The Court of Appeals of Georgia erred in holding that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive within the scope and purview of the Boiler Inspection Act and that the use of such device on the locomotive imposed upon petitioner the absolute duty of maintaining same in such condition that it would always operate in case of a front truck derailment and in holding that the failure of the device to operate on this particular occasion was a violation of such duty; and, in so holding, the Court of Appeals of Georgia misinterpreted and misapplied said Act.

8. The holding of the Court of Appeals of Georgia to the effect that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive in question within the meaning and purview of the Boiler Inspection Act and that by reason of the use thereof there devolved upon the petitioner an absolute duty to maintain it in such condition that it would operate on all occasions and under all circumstances when the front trucks of the locomotive became derailed, was a decision upon federal questions of substance not theretofore expressly determined by this Court, but in a way, as petitioner insists, that is probably not in accord with the applicable decisions of this Court, and was a decision upon important questions

of federal law which have not been, but should be, settled by this Court, for each and all of the reasons hereinbefore specifically set forth.

9. The principle of the decision by the court below is of large public importance. That decision, if allowed to stand, would tend to prevent or deter railroads from experimentation to develop new safety devices, and such experimentation is necessary to enable the development of such devices in the interest of public safety to a point of perfection where they may be approved and required by the Interstate Commerce Commission as necessary devices under the Boiler Inspection Act.

WHEREFORE, because said Court of Appeals of Georgia, in its decision and judgment, misinterpreted and misapplied the Safety Appliance Acts, and particularly the Boiler Inspection Act, hereinbefore specifically referred to, and, in so doing decided the federal questions involved erroneously, because said Court of Appeals of Georgia denied petitioner's application for rehearing, and because the Supreme Court of Georgia denied petitioner's application for writ of certiorari, your petitioner, upon this petition, upon the annexed brief, and upon the certified transcript of the record of all proceedings in the Court of Appeals of Georgia and of the denial by the Supreme Court of Georgia of petitioner's application for writ of certiorari, prays that a writ of certiorari be issued by this Court to the end that said cause may be reviewed and determined by this Court as provided by law, and that upon such review the said judgment and decision of the Court of Appeals of Georgia be reversed.

SOUTHERN RAILWAY COMPANY,
By G. E. MADDOX,
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Attorneys for Petitioner.

S. R. PRINCE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No.

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of Estate of J. M. COX, Deceased, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Georgia has not yet been officially reported, but will be found in 179 S. E. 171. A copy of that opinion will be found in the record, beginning at page 155.

II.

JURISDICTION.

The date on which the judgment sought to be reviewed became final was the 29th day of May, 1935.

The jurisdiction of this Court is invoked on the ground that petitioner, in the courts below, claimed immunity from liabilty and asserted rights under the Federal Employers' Liability Act, 45 U. S. C. 51-59, and under the Boiler Inspection Act, 45 U. S. C. 22-34, statutes of the United States, which claims and rights were denied, and that petitioner has not heretofore had opportunity to submit said claims and rights for adjudication to any federal tribunal, jurisdiction being therefore invoked under Judicial Code, Section 237, as amended, 28 U. S. C. 344 (b).

Some of the cases believed to sustain the jurisdiction of this Court are:

Northwestern Pacific R. Co. v. *Bobo,* 290 U. S. 499;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458;
Atchison, T. & S. F. R. Co. v. *Toops,* 281 U. S. 351;
Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472;
Virginian R. Co. v. *Mullins,* 271 U. S. 220, 222;
Fullerton-Krueger Lumber Co. v. *Northern Pacific R. Co.,* 266 U. S. 435;
American Ry. Exp. Co. v. *Levee,* 263 U. S. 19;
Andrews v. *Virginian R. Co.,* 248 U. S. 272;
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.

The petitioner properly prays that the writ be directed to the Court of Appeals of Georgia, it appearing that the Supreme Court of Georgia declined to exercise its discretion to entertain an application for writ of certiorari (R. 166), and that it is the decision and judgment of the Court of Appeals of Georgia which is brought under consideration by the petition to this Court for certiorari.

Davis v. *Cohen & Co.,* 268 U. S. 638;
Central New England Ry. Co. v. *Boston & Albany R. Co.,* 279 U. S. 415.

III.

STATEMENT OF THE CASE.

The accompanying petition for the writ of certiorari briefly and concisely states the relevant facts. References to the facts will be made and repeated in the body of this brief only in so far as the same may be necessary in the discussion of the questions involved.

IV.

SPECIFICATION OF ERRORS.

The errors assigned and relied on by petitioner are the following:

1. That the Court of Appeals of Georgia erred in affirming the judgment of the court below in overruling defendant's demurrers, paragraph 10 (a), (b), and (d), to the first count of the petition (R. 25-26), which are as follows:

> "(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, or (are) insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.
>
> (b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Acts of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class railroads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.
>
> (d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant,"

and erred in affirming the judgment of the Court below in overruling demurrers in the same language to the second count of the petition, paragraph 7, (a), (b), and (d), (R. 29-30).

2. That the Court of Appeals of Georgia erred in affirming the verdict and judgment of the court below and in refusing to sustain grounds of exceptions to instructions in the court below submitting in charge to the jury a portion of the Boiler Inspection Act of Congress, as follows, to-wit:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for"

and in instructing them, in substance, that the same was applicable, that the device known as "Wright's Little Watchman" was a part and appurtenance of a locomotive within the meaning of said Act, and that this imposed upon the petitioner the absolute duty to keep and maintain the same free from defects and safe to operate (R. 121-135); and, in passing upon said exceptions, holding, in substance and effect, that said Act was applicable, that the device known as "Wright's Little Watchman" is a part and appurtenance of a locomotive within the purview of the Federal Safety Appliance Acts, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such

Federal laws to be attached to the locomotives of interstate railway companies (R. 159-164, Sections 4, 5, 6, 9, 10, and 12 of the Opinion), the exceptions to such instructions being, in substance and effect:

(a) That these provisions of the Boiler Inspection Act, especially under the evidence in the case, and the instructions applying the same to the use by petitioner of the device known as "Wright's Little Watchman" were wholly inapplicable and in no way pertinent;

(b) That the failure of said "Wright's Little Watchman" to operate would not be negligence on the part of the petitioner as charged by the trial court, and that no absolute duty devolved upon it to keep the same in proper condition and safe to operate in the service, for the reason that no such device was required to be used by said Act, or by any rule or regulation of the Interstate Commerce Commission promulgated in pursuance thereof; and

(c) That the undisputed evidence showed that the device known as "Wright's Little Watchman" in no way imperiled the safety of the train or any person or employee thereon.

V.

ARGUMENT.

THE BOILER INSPECTION ACT IS INAPPLICABLE IN THE PRESENT CASE AND THE COURTS BELOW MISAPPLIED THAT ACT AND WRONGLY IMPOSED LIABILITY ON PETITIONER THEREUNDER.

We do not contend that where a railroad voluntarily installs on a locomotive a device not required by the Commission's rules it would not be liable *under the Employers' Liability Act* for negligent installation or negligent failure to maintain if such negligence should proximately cause injury. That is not this case.

Here there was no evidence that the "Little Watchman" was negligently installed or maintained or that its failure to function on this occasion was due to petitioner's negligence. The nature of the device is such that *res ipsa loquitur* could not apply to authorize a finding of *negligence* upon mere proof of failure to function. What we have here is the imposing upon petitioner of liability as for violation of an *absolute duty under the Boiler Inspection Act,* regardless of negligence or fault, upon the sole basis of proof that the device did not function as hoped on this occasion.

The language of the Boiler Inspection Act here involved, 45 U. S. C. 23, is as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The purpose of this section was, of course, to promote safety in the operation of trains. The keys for determining whether a locomotive is safe to operate within the meaning of that section are found in the words "safe to operate" and "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," and the further provisions as to inspection and the withstanding of tests. We submit that these words in the Act necessarily confine it to (a) the essential parts and appurtenances necessary to safe operation; (b) such parts and appurtenances as are specifically mentioned in the Safety Appliance and Boiler Inspection Acts or in the rules and

regulations promulgated by the Interstate Commerce Commission in pursuance thereof.

We most respectfully insist that the device known as "Wright's Little Watchman" does not fall within any of these classifications, and is not a part or appurtenance of a locomotive within the meaning and purview of the Act.

Without repeating, we refer to the description of the device and of its operation and to the testimony of witnesses Goff and Madden set out in the foregoing petition (pp. 4-5, 9-10). This testimony as to the operation of the device in actual practice is undisputed and shows (a) that its use was not required by any rule or regulation of the Interstate Commerce Commission; (b) that it is in a mere experimental stage of development, that it operates differently on different engines of the same class, operating at times and stopping the train when there is no derailment of the trucks and at some times operating and at other times failing to operate when the front trucks are derailed,—in other words that it is extremely uncertain in its operations and is an unproved, uncertain device which could not be universally relied upon; and (c) that the use thereof on the locomotive could not possibly endanger the operation of the train, but, on the contrary, that it was a super-added safety device, used in the hope that it might possibly operate if the front trucks became derailed.

This testimony clearly demonstrates that the use of this device did not render the locomotive unsafe to operate in the service, and that it could not possibly bring about "unnecessary peril to life or limb".

In Section 4 of its opinion (R. 159), the Court of Appeals of Georgia says:

> "The gist of section 23 of the act of Congress of April 22, 1908, as amended in 1911 and 1915, known as the Federal safety-appliance act, which was passed for the purpose of regulating the liability of interstate carriers, is to make it 'unlawful for any carrier to use * * * any locomotive unless said locomotive, its boiler,

> tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which put', and further that 'said locomotive, its boiler, tender and all parts and appurtenances' must be inspected as therein provided."

This statement, as we insist, illustrates the misconception by the Court of Appeals of Georgia of the provisions of the Boiler Inspection Act. No reference is made or effect given to the all-important words in that statute, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb." If Congress had intended that any and every device used on a locomotive, regardless of the purpose or effect thereof, should fall within the terms of that statute, it would have stopped with the words "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances are in proper condition and safe to operate in the service to which the same are put." But Congress did not stop there. Congress qualified and limited the foregoing language by adding the words, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," and by the further provisions as to tests to be prescribed in the rules and regulations to be made by the Interstate Commerce Commission. These latter provisions must have and must be given some meaning and effect. The use thereof must necessarily mean that the provisions of the act were not intended to apply to every device of every kind and character that might be placed on a locomotive. Unless that is the meaning thereof those words are without any meaning whatever and are of no effect; and that seems to be the interpretation given the act by the Court of Appeals of Georgia.

The contention of the petitioner in this case, it seems to us, is clearly recognized and applied by this Court in the case of *Baltimore & Ohio Railroad Company* v. *Groeger*,

266 U. S. 521. In that case the decedent was killed by the explosion of the boiler of a locomotive, and it was contended that the defendant's failure to have a fusible plug in the crown sheet violated the Boiler Inspection Act. The trial judge, in substance, instructed the jury that it was for them to determine whether the standard of duty imposed by this Act required a fusible safety plug to be installed, and, if so, that the absence thereof would impose liability upon the defendant. In passing on this question, this Court said (pp. 529-531):

> "The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. *There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs* * * * If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. *But we think the question was not for the jury.* * * * The act required a condition which would permit use of the locomotive without *unnecessary* danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance, and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine ten-

> ders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end * * * The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act. But we think the court * * * erred in authorizing the jury to decide that 'the standard of duty imposed by law required a fusible safety plug to be installed', and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability'." (Italics ours.)

We call particular attention to the expressions in that decision as follows:

> "There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs."
>
> *"The act required a condition which would permit use of the locomotive without unnecessary danger."*

In that case, plaintiff's contention was that the statute had been violated for the reason that the boiler was not safe, and that decedent was exposed to "unnecessary peril" because of the failure to use a fusible plug in the crown sheet, and that the explosion would not have occurred had a fusible plug been used therein. This Court expressly rejected the contention that the use of the boiler without a fusible plug therein was, in and of itself, a violation of the statute, but said that the presence or absence of a fusible plug might be taken into consideration "in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act", and then added:

> "But we think the court * * * erred in authorizing the jury to decide that 'the standard of duty imposed by the law required a fusible safety plug to be installed', and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability'."

We most earnestly insist that the foregoing is in irreconcilable conflict with the holding of the Court of Appeals of Georgia (R. 160, Section 5), that the little watchman "is properly a part and appurtenance of the locomotive within the purview of the Federal safety-appliance laws, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies," and similar expressions in the opinion rendered.

As specifically stated by this Court in the *Groeger case*, "the act required a condition which would permit the use of the locomotive without *unnecessary* danger".

Another very pertinent case is that of *United States* v. *Southern Railway Company*, 1 F. (2d) 487, in which the Boiler Inspection Act was under consideration, and in which Judge Hicks, of the United States District Court in Tennessee, said (p. 488):

> "Section 2 of the act provides that 'it shall be unlawful * * * to use any locomotive engine * * * unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' Section 5 provides for the promulgation of rules and

regulations and inspections, and the rules and regulations material to the issue here are set forth in paragraph 2 of count 1 of the declaration. These rules must be considered as part of the statute. Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

"It is to be noticed that section 2 makes it unlawful to use a locomotive engine unless its boiler is in proper condition and safe to operate, and, of course, there must be some *fixed standard* by which is determined the question as to whether a boiler is 'in proper condition and safe to operate,' and this standard must necessarily be: *Have the rules and regulations been observed? If they have, the engine may be used; otherwise, not.*" (Italics ours.)

In this decision, Judge Hicks very clearly declares the rule that except as to equipment specifically mentioned in the Act itself, the rules and regulations promulgated by the Interstate Commerce Commission, as authorized by the act, fix the standard by which it is to be determined whether or not a locomotive is in proper condition and safe to operate as required by the Act.

We most respectfully submit that the decision and opinion of the Court of Appeals of Georgia in the present case cannot be reconciled with the *Groeger case* and with the decision of Judge Hicks.

Substantially the same ruling was made in the case of *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, in which this Court held that "the power conferred upon the Interstate Commerce Commission by the amendment in 1924 to the Boiler Inspection Act, to prescribe rules to enforce compliance with the requirements that locomotives, boilers, tenders, and all parts and appliances thereof, are in proper condition and safe to operate, occupies the entire field so as to exclude state power to require automatic doors to fire boxes, and cab curtains", and, in the opinion (page 612), occurs the following pertinent statement:

> "The duty of the commission is not merely to inspect. *It is, also, to prescribe the rules and regulations by which fitness for service shall be determined.* Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. *Thus the commission sets the standard. By setting the standard it imposes requirements.*" (Italics ours.)

And at page 613 the Court further said:

> "Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose. * * * If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it."

In the recent case of *United States* v. *Baltimore & Ohio R. Co.*, decided January 7, 1935, 293 U. S. (Adv.) 454, the language above quoted from the Napier case is quoted and adhered to; and in addition thereto are the following pertinent statements:

> "But the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission", etc., (page 461)

and on pages 462-463, in discussing the necessity for findings by the Commission, this Court said:

> "The railroads contend that to support the order certain basic findings are essential. * * * This contention is in our opinion sound. The act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable. The operation of an engine, however equipped, involves some 'danger to life or limb'. * * * And the act conferred authority to prescribe by rule specific devices, or changes in the equipment, *only where these are required to remove 'unnecessary peril to life or limb'.*" (Italics ours.)

If the Commission is without power to make a rule *requiring* the use of a specific device without a basic finding that the use thereof is "required to remove 'unnecessary peril to life or limb'," then it seems to us it necessarily follows that the voluntary use of a device which from its very nature and as shown by the undisputed testimony could not possibly endanger the operation of the train, and therefore could not possibly cause "unnecessary peril to life or limb", would not be the use of a part or appurtenance of the locomotive within the meaning of the Act.

It also seems to us that our contention as to the proper construction and application of the Act is supported by the language used by the Court of Appeals of Georgia in the case of *Western & Atlantic R. Co.* v. *Meister*, 37 Ga. App. 570, 579, 140 S. E. 905, in which that Court said:

> "However, since there is nothing either in the statute or in any rule of the Interstate Commerce Commission forbidding the link and hook connection, the mere fact that it was used would not amount to an infringement of the law, provided that with it the brake was still efficient."

In the present case the locomotive was "still efficient" and still "safe to operate in the service," whether equipped with "Wright's Little Watchman" or not. If the present case had been exactly as it was except that no "Wright's Little Watchman" had ever been installed on the locomotive, the locomotive would have fully complied with the requirements of federal laws and there could have been no ground for contention that any violation of the Boiler Inspection Act had imposed absolute liability on the petitioner. With the "Watchman" installed but failing to operate on the particular occasion, the locomotive was exactly as safe for operation as if the "Watchman" had never been installed. The only difference was that it had an added safety device, not required by law, which under certain conditions might prevent an accident which would occur to a

perfectly lawful locomotive not so equipped. The decision below imposed liability on petitioner as for violation of the Act merely because this added device failed to prevent an accident which would have equally occurred had the locomotive never been equipped with the device, a case in which there would have been no liability under the law.

We further most respectfully submit that the cases cited by the Court of Appeals of Georgia either support our contention or else are in no way pertinent to the question involved in this case. Some of these cases have hereinbefore been commented on.

Th case of *W. & A. R. Co.* v. *Townsend,* 36 Ga. App. 70, 135 S. E. 439, was based upon a violation of the Safety Appliance Act by reason of using a defective air brake, it not being questioned that an air brake was a part or appurtenance within the meaning of the statute and the rules and regulations of the Interstate Commerce Commission. Really the only question involved in that case was with reference to the damages recoverable in such a case.

The case of *Lehigh Valley R. Co.* v. *Beltz,* 10 F. (2d) 74, is based squarely on the proposition that the condition of the locomotive was such as to make it unsafe to operate in the service to which it was put, and that in the operation thereof "the main pin broke, causing the driving and parallel rods to fly about, disabling the engine and punching a hole in the boiler, causing a violent emission of steam, hot water, and coals of fire into the cab," causing those on the engine to jump in an effort to save their lives, and that the decedent was killed. That was squarely a case where a part or appurtenance of the locomotive, necessary to its safe operation, was defective. It was not, as in this case, an unnecessary device which might possibly increase but could not possibly impair the safety of the operation or use of the locomotive.

The case of *Wyatt* v. *N. Y., etc., R. R.,* 45 F. (2d) 705, involved the failure to provide a rear light on a yard engine as specifically required by the rules and regulations of the

Interstate Commerce Commission adopted pursuant to the Boiler Inspection Act of Congress.

In the case of *Fredericks* v. *Erie R. Co.*, 36 F. (2d) 716, involving the use of a pet-cock on a locomotive, a recognized necessity thereon, two theories were relied upon,—one that the pet-cock was insecurely fastened, and the other that it was improperly located on the engine. The plaintiff was injured while attempting to use this pet-cock. The court held, in substance, that if the pet-cock was improperly fastened it was a violation of the act, but that its location was a matter in the discretion of the railroad company and was not a violation of the act. No question was made in that case that the pet-cock was not an appliance within the meaning of the act.

The case of *Hines* v. *Smith,* 275 Fed. 766, involved a defective condition in and the failure to operate of an automatic bell ringer. The facts of the case show that the hand bell ringer operated from the fireman's side of the engine, and that the fireman was not on the train at the time of the accident. The court pointed out that the engineer was compelled to remain on his seat in order to run the engine, and that he could not leave it in order to operate the hand bell ringer. The liability imposed in that case was because of the failure to ring the bell, as a result of which another employee in the yard was not warned of the approach of the engine and was injured as a result thereof. The necessary inference from that decision is that the only thing necessary was that the bell be rung, either automatically or by hand. The decision is not predicated upon the failure to provide an automatic bell ringer, but because the bell was not rung in some way. A bell is a fixed appliance and is a necessary part of every engine for its safe operation. The placing and ringing thereof under stated conditions is required by the law of Georgia and the laws of every other State with which we are familiar. A bell will ring whether the power be applied automatically or by hand. A bell is a recognized part of every engine, sure in

its operation. That case is in no way pertinent to the question involved in the case at bar.

Without going into detail with respect thereto, we submit that a careful reading of every decision cited by the Court of Appeals of Georgia will show that the instrumentality involved was a necessary part of the equipment of the locomotive or boiler, was a proven device which would always operate when in proper condition, and without which the locomotive would be unsafe to operate. All of those cases are clearly differentiated from the present case, where the instrumentality involved is purely experimental, unperfected, unproved and uncertain in its operation; is in no way a necessary part of a locomotive, performs no function in the normal operation thereof, cannot possibly affect or in any way increase the hazard in operating it, but is used solely in the hope that it may possibly operate and may possibly avert a casualty in the event the front trucks of the locomotive become derailed by some other cause.

If, as we insist, this device known as "Wright's Little Watchman" was not a part or appurtenance of the locomotive within the meaning and purview of the Boiler Inspection Act then the instructions of the trial judge giving this act in charge to the jury, instructing that it placed upon the defendant an absolute duty to maintain the device in proper working order, and that a failure of the device to operate would be a violation of the act and impose liability upon the defendant railway company, were highly prejudicial and harmful to the defendant railway company, and, in effect, instructed the jury that the defendant was liable and that their only duty was to fix the amount of the damage.

Under the practice in Georgia, in a case of this character, specific questions are not submitted to the jury for answer but merely a general verdict is rendered. Therefore, any error in the instructions necessarily entered into the rendition of any verdict by the jury.

In this case petitioner has been unjustly penalized because it undertook to do more than federal law required as to safety of its locomotive, because it applied a device not required, a device which, under certain circumstances, might operate to achieve a higher standard of safety than the law demands but could never operate to lower safety below the standard fixed by law, and liability has here been imposed upon petitioner because the device on the particular occasion did not succeed in achieving the possible standard of safety higher than the law requires but left the locomotive in precisely the same condition of safety as if the device had never been applied; that is, a condition of full and complete compliance with all requirements of federal law.

CONCLUSION.

For the reasons assigned in the petition for certiorari, and because of the facts and the law set out in this brief accompanying said petition, we most respectfully submit that the writ of certiorari should be granted, and that, after full consideration by this Court, the judgment and decision of the Court of Appeals of Georgia herein should be reversed.

Respectfully submitted,

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